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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/602,416	06/23/2003	Scott Seamans	40130-050010	9598

20350 7590 10/19/2007  
TOWNSEND AND TOWNSEND AND CREW, LLP  
TWO EMBARCADERO CENTER  
EIGHTH FLOOR  
SAN FRANCISCO, CA 94111-3834

EXAMINER
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MOHANDESI, JILA M

ART UNIT	PAPER NUMBER
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3728

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10/19/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.



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APPLICATION NO./ CONTROL NO.	FILING DATE	FIRST NAMED INVENTOR / PATENT IN REEXAMINATION	ATTORNEY DOCKET NO.
10602416	6/23/03	SEAMANS, SCOTT	40130-050010

TOWNSEND AND TOWNSEND AND CREW, LLP  
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EXAMINER

Jila M. Mohandesi

ART UNIT	PAPER
3728	20071015

DATE MAILED:

**Please find below and/or attached an Office communication concerning this application or proceeding.**

Commissioner for Patents


The Reply Brief filed May 12, 2006 has been entered and considered. The application has been forwarded to the board of Patent Appeals and Interferences for decision on the appeal.

A second copy of the Examiner's Answer including missing page 8 is forwarded and is attached.

The relevant prior art cited on the Information Disclosure Statements filed March 22, 2006 and January 22, 2007 were considered.

Inquiries concerning the merits of the examination should be directed to Jila Mohandesi whose telephone number is (571) 272-4558.

\* Attachment: A Copy of the Examiner's Answer  
Signed IDS

  
Jila M Mohandesi  
Primary Examiner  
Art Unit: 3728



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Commissioner for Patents  
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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/602,416  
Filing Date: June 23, 2003  
Appellant(s): SEAMANS, SCOTT

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Darin Gibby  
For Appellant

**EXAMINER'S ANSWER**

(2nd copy)

This is in response to the appeal brief filed March 15, 2006 appealing from the Office action mailed January 09, 2006.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

No amendment after final has been filed.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

6,237,249	AGUERRE	05-2001
4,476,600	SEIDEL et al.	10-1984
2,897,566	ALBINIANO	08-1959

admitted prior art page 11 of the instant specification

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1, 9, 12-16, 18-23, 26-27 and 40-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Aguerre (6,237,249) in view of Seidel et al. (4,476,600), the admitted prior art on page 11 of the instant specification and Albiniano (2,897,566). Aguerre '249 discloses a breathable footwear (ventilation holes 130) with a sole comprising an outer portion of a rear sole perimeter, a bottom surface and a support base, and wherein the support base includes a raised pattern where the foot contacts the support base to provide support to the heel of the wearer and helps maintain the footwear in position. Aguerre '249 also discloses the breathable footwear to include a strap pivotable attached by a plastic rivet at opposite ends thereof to the base section for securing the footwear on the foot of the wearer. Aguerre '249 does not disclose the upper and sole section being formed from a piece of lofted foam material and for the strap to made of lofted foam and it is also silent as whether the pivotable strap contacts the outer portion of the rear sole perimeter. Seidel '600 discloses a breathable footwear piece with ventilation holes, the breathable footwear piece comprising: a base section, wherein the base section includes an upper and a sole formed as a single part molded

Art Unit: 3728

from a first continuous piece of expandable foam material. See Figures 1 and 6 embodiments. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to make all the parts of the footwear of Aguerre '249 from expanded foam material as taught by Seidel '600 for easier and cheaper manufacturing of the footwear.

With respect to the expandable foam material of Seidel '600 being lofted foam material, the admitted prior art in the instant specification discloses that it is desirable to manufacture footwear from an expandable EVA known commercially as LEVIREX which is considered to be a lofted foam material which can exhibit a final growth value of between 1.47 and 1.58. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to make the modified footwear of Seidel '600 from lofted foam material as taught by the admitted prior art in the instant specification to provide a relatively soft footwear piece that has very good anti-slip capabilities, and at the same time, size reproducibility and durability.

With respect to claims 12, 15, 18 and 42, Aguerre '249 clearly shows in Figures 2 embodiment that distance between the distance from the first attachment point to the second attachment point along the upper opening perimeter is **approximately** the same distance from the first attachment point to the second attachment point along the strap section. Aguerre '249 clearly shows in Figure 1 embodiment that the distance from the first attachment point to the second attachment point along the rear sole perimeter **approximately** the same distance from the first attachment point to the second attachment point along the strap section.

Albiniano '566 discloses that it is desirable to have the strap also swivel/pivot towards the back of the shoe and maintained on the rear sole perimeter by the frictional force between the strap section and the base section at the contact between the inner portion of the strap section and the outer portion of the rear sole perimeter to better secure the strap and allow the shoe to be worn without the strap in different arrangement to give the wearer different design options. The strap is connected to the base by means of rivet (12) and the strap contacts the base directly.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to also have the strap of Aguerre '249 swivel to the back of the shoe and contact the outer portion of the rear sole perimeter and be maintained fixed relative to the base section as taught by Albiniano '566 to allow the shoe to be worn without the strap in different arrangement to give the wearer different design options.

With respect to claim 23, see Figures 1 and 2 of Aguerre '249, which includes both toe, and heel raised sections for better supporting the foot.

With respect to claims 20-22, Seidel '600 discloses an upper that includes a substantially vertical region, where the vertical region includes a toe region and opposing side regions, and wherein the toe region is solid portion, and wherein at least some of the plurality of ventilators are formed in the side regions. Aguerre '249 discloses a toe region that clearly follows the contour of a human foot. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to make the toe region of the upper of Aguerre '249 extend at a location

Art Unit: 3728

corresponding to the larger toes of the human foot as taught by Seidel '600 to provide better protections to the toes of the wearer.

The product-by-process limitation in claim 26 results in no structure that is different from Aguerre '249 as modified above.

Claims 24 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to claim 1 above, and further in view of Lamstein (Des. 416,667). Aguerre '249 as modified above discloses all the limitations of the claims except for the support base including raised pattern extending throughout the surface and for the bottom surface of the sole having front and rear tread patterns longitudinally connected by a flat section. Lamstein discloses a molded footwear with the support base including raised pattern extending throughout the surface inasmuch as that which is shown by the applicant in his Figures. The bottom surface of the sole has front and rear tread patterns longitudinally connected by a flat section. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the support base with raised pattern extending throughout the surface of the footwear of Aguerre '249 as taught by Lamstein for better massaging the foot and for the bottom surface of the sole having front and rear tread patterns longitudinally connected by a flat section for easier manufacturing as taught by Lamstein.

#### **(10) Response to Argument**

In response to appellant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon



hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In this case Albiniano '566 clearly discloses that it is desirable to have the heel strap held fixed in place by the frictional force between the strap section and the base section at the contact between the inner portion of the strap section and the outer portion of the rear sole perimeter. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to extend the strap of Aguerre '249 to the back of the footwear and be held fixed in place by the frictional force between the strap section and the base section at the contact between the inner portion of the strap section and the outer portion of the rear sole perimeter as taught by Albiniano '566 to better secure the strap to the back of the shoe so as to allow the shoe to be worn without the strap in different arrangement to give the wearer different design options.

Contrary to appellant's argument the modified strap of Aguerre ,249 will pivot and contact the outer portion of the rear sole perimeter.

In response to appellant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in

the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, it would have been obvious to one of ordinary skill in the art at the time the invention was made to make all the parts of the footwear of Aguerre '249 from expanded foam material as taught by Seidel '600 for convenience and easier and cheaper manufacturing of the footwear.

In response to appellant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Appellant is arguing more than that which is claimed. Appellant argues that Lamstein does not have a raised pattern in a section where a human foot would come into the greatest amount of contact with it. The claim only requires that the support base have a raised pattern extending throughout the surface where the foot contacts the support base and not to the specific location where a foot would come in the **greatest amount of contact** with the support base. Appellant does not claim that the raised pattern is located under the foot as it appears the appellant is arguing, but is claiming the raised patterns to be on a surface that the foot would come in contact with and not having the raised pattern being located in the place on the surface where the foot would come in contact with the surface.

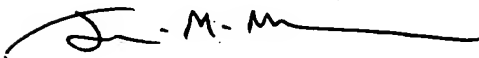
Art Unit: 3728

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

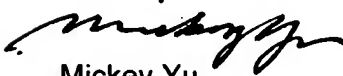
For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

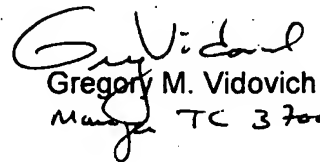


Jila Mohandesi  
Primary examiner  
Art unit 3728

Conferees:



Mickey Yu  
Supervisory Patent Examiner  
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Gregory M. Vidovich  
Manager TC 3700